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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1440

EDWARD W. MAHER, Commissioner of Social Services of the State of Connecticut
Appellant,

v.

SUSAN ROE, et als.
Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

BRIEF OF THE APPELLANT

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OPINION BELOW

The opinion of the three-judge District Court which is the subject of this appeal is reported at 408 F. Supp. 660 (1975). A copy of that opinion is contained in the juris. statement (No. 75-1440), at p. 18. Earlier opinions in this same case are reported in 380 F. Supp. 726 (D. Conn. 1974) (in which a single-judge District Court considered the pendant statutory claim and ruled that the state regulation was "invalid as contrary to the Medicaid provisions of the Social Security Act); and in 522 F.2d 928 (2d Cir. 1975) (in which the Court of Appeals reversed and remanded for convening

of a three-judge district court to consider the constitutional issues, one judge concurring in part and dissenting in part).

JURISDICTION

This action was brought by plaintiffs (appellees) under 42 U.S.C. § 1983 and jurisdiction was based on 28 U.S.C. § 1343(3) and 28 U.S.C. § 2281. In the hearing on remand from the Court of Appeals before a three-judge District Court, the plaintiffs were seeking injunctive relief restraining the appellant-state commissioner of social services from the enforcement, operation and execution of a regulation of statewide applicability on the ground of its unconstitutionality.

The three-judge District Court, after a hearing on plaintiffs' motion for summary judgment, entered judgment on January 16, 1976, (Juris. Statement, p. 26), and this appeal was docketed on April 9, 1976.

The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by 28 U.S.C. § 1253.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

Amendments to the Constitution of the United States

• • •

ARTICLE XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due

process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

• • •

Sections 17-134a and 17-134d of the General Statutes of Connecticut, Revision of 1958, Revised to January 1, 1975, are the statutes involved in this action; and Section 275, Volume 3, Chapter III, Connecticut Department of Social Services, Public Assistance Program Manual is the regulation whose validity is involved in this action. The statutes read as follows:

> Sec. 17-134a. Acceptance of federal grants for medical assistance. The welfare commissioner is authorized to take advantage of the medical assistance programs provided in Title XIX, entitled "Grants to States for Medical Assistance Programs," contained in the Social Security Amendments of 1965 and may administer the same in accordance with the requirements provided therein, including the waiving, with respect to the amount paid for medical care, of provisions concerning recovery from beneficiaries or their estates, charges and recoveries against legally liable relatives, and liens against property of beneficiaries.
>
> Sec. 17-134d. Regulations. The welfare commissioner may make such regulations as are necessary to administer the medical assistance program.

A copy of the regulation, Section 275, is contained at A. 7.

QUESTIONS PRESENTED

Under Connecticut's Title XIX Medical Assistance ("Medicaid") Program, payment for medical services to eligible recipients is limited to those which are medically necessary for the patient's health. Payment for an abortion under the

program will be made if the recipient's attending physician will certify that the abortion is either medically or psychiatrically necessary for the patient's health. The attending physician's certification of medical necessity in such a case is never challenged.[1]

The questions presented by this appeal are:

I. Whether the failure of Connecticut's medical assistance program to also include a provision for payment of the cost of an abortion which is admittedly not necessary for the patient's physical or psychiatric health violates the plaintiffs' rights under the equal protection clause of the Fourteenth Amendment, or any other of plaintiffs' constitutionally protected rights.

II. Whether, on a motion for summary judgment, it was proper for the district court to enjoin the defendant-commissioner's requirement that prior approval be obtained before payment would be made for an abortion under Medicaid, since there was a disputed issue of fact on this question.

III. Whether the district court improperly struck down the requirement that, before an abortion would be paid for under the Title XIX medical program, the recipient-applicant's prior written consent must be obtained.

STATEMENT

This action was brought by two women who were eligible for and receiving medical benefits under Connecticut's "Medicaid" program. Plaintiff Roe had had an abortion in September, 1973, for which the welfare department had refused to pay the hospital bill of $244.20. Plaintiff Poe was

[1]"The welfare department makes no attempt to define this term. This is a matter left entirely to the attending physician." *Answer to Interrogatories*, question 6A, (A. 10).

pregnant at the time the suit was brought and she obtained a temporary restraining order which prevented the defendant welfare department from refusing to pay under its Medicaid program the costs of her abortion.

Neither plaintiff submitted to the (then) welfare department the certification of her physician that the abortion was medically or psychiatrically necessary for the patient's health.[2]

On the plaintiffs' motion for a summary judgment, a single-judge District Court found that the constitutional claim was sufficiently substantial to invoke the jurisdiction of the court and to justify consideration of the pendant statutory claim without convening a three-judge court pursuant to 28 U.S.C. § 2281.

The District Court thereupon, found that the defendant's regulation concerning abortion services was "invalid as contrary to the Medicaid provisions of the Social Security Act" and permanently enjoined its enforcement. *380 F. Supp.* 726, 730.

On appeal by the defendant, the U.S. Court of Appeals (2d Cir.) reversed the decision of the District Court, holding that "while Title XIX *permits* federal reimbursement for elective abortions, it does not *forbid* state regulations limiting Medicaid payments for abortions to those which are therapeutically necessary for the health of the pregnant woman." *522 F.2d* 928, 935, and remanded the case for the convening of a three-judge court to consider the constitutional issues pursuant to 28 U.S.C. § 2281.

[2]The plaintiffs have admitted that the abortions for which payment was being sought were *not* abortions which were medically necessary for the respective patient's health. That determination was made in each case by the physician of each plaintiff's own choosing. See affidavits of Drs. Kauders (A. 22, 28); Corley (A. 32, 60 and 62); Horowitz (A. 36 at 37, 56 at 58); Jonas (A. 63 at 64).

The three-judge District Court, on remand, after oral argument on plaintiffs' motion for summary judgment, found that "those provisions of § 275 that require certification that an abortion is medically necessary are unconstitutional, and the defendants are hereby enjoined from enforcing them." 522 *F.2d* 928.

SUMMARY OF ARGUMENT

Connecticut does not infringe upon the plaintiffs' constitutionally protected rights to an abortion, as enunciated by this Court in *Roe* v. *Wade*, 410 U.S. 113 (1973), when it fails to provide, under its Title XIX Medical Assistance Program, payment for an elective, non-therapeutic abortion.

Under that program, payment is made for an abortion if it is medically necessary for the patient's health. Similarly, payment is made for medical services for childbirth and for prenatal and postnatal care but only for such services which are medically necessary for the patient's health. Payment for an abortion, however, requires that prior authorization for payment be obtained from the Department of Social Services — most physician's services for prenatal and postnatal care would not require such prior authorization. To obtain such prior authorization, the patient's own physician must certify in writing that such an abortion is medically necessary for the patient's health. This physician's certification is not questioned by the Department of Social Services and the medical judgment of the physician is not subject to further review of any kind (Answers to Interrogatories, A. 10, 11; Answers to Plaintiffs' Second Interrogatories to Defendants, A. 12 at 13).

The district court has held *inter alia*, that "when Connecticut refuses to fund elective abortions while funding therapeutic abortions and prenatal and postnatal care, it weighs

the choice of the pregnant mother against choosing to exercise her constitutionally protected right to an elective abortion . . . [H]er choice is affected not simply by the absence of payment for the abortion, but by the availability of public funds for childbirth if she chooses not to have the abortion. When the state thus infringes upon a fundamental interest, it must assert a compelling interest that justifies the incursion. *Dunn* v. *Blumstein*, 405 U.S. 330, 338-342 (1972)." Memorandum of Decision, Juris. Statement, No. 75-1440, 20-21.

However, since the requirement that they be medically necessary for the patient's health applies to all medical services provided, no invidious discrimination is made by the State in its treatment of abortion under the program.

If this is so, then, contrary to the district court's holding below, there is no infringement upon the plaintiffs' constitutionally protected right to an abortion — the State does *not* "weigh the choice of the pregnant mother against choosing to exercise her constitutionally protected right" — and the holding of the lower court really amounts to a claim that the State is required to fund, for an indigent, the cost of the exercise of a fundamental right. Such a proposition is *not* supported by the prior decisions of this Court.

In determining whether the State's policy on payment for abortions results in a denial of the plaintiffs' rights to equal protection, the appropriate standard to be applied, under the prior decisions of this Court, is the "rational basis" test enunciated in *Dandridge* v. *Williams*, 397 U.S. 471 (1970), and *not* the "compelling state interest" test of *Dunn* v. *Blumstein*, 405 U.S. 330 (1972), a case which the district court cited in support of its decision. This is so because the issue involved in this case is *not* the plaintiffs' constitutionally protected right to choose to have an abortion — Connecticut does not interfere with that choice — but, rather the right of the

plaintiffs to receive medical welfare benefits. Connecticut's policy on payment for abortion under Medicaid easily meets the former test, since the state's reason for limiting the scope of coverage under its medical program to medical services which are medically necessary for the patient's health (including abortion services) is the need to limit the size of its welfare budget, especially at a time when it is experiencing a fiscal crisis. This reason was articulated by defendant's counsel at oral argument on the plaintiffs' motion for summary judgment in response to questions from the court. (Transcript of Proceedings, R. 54, p. 25). This reason was rejected by the district court in its memorandum of decision wherein it went on to state that:

> "The only other possible state interest [for Connecticut's policy on payment for abortions under its Medicaid program] would be that of avoiding the expenditure of public funds for a purpose the state finds morally objectionable." (Memorandum of Decision, Juris. statement, No. 75-1440, 18 at 21).

Thus, the district court imputed, improperly, to the defendant-commissioner a motive for his policy on payment for abortions for which there was no support whatever in the record. The articulated reason for Connecticut's policy, i.e., the need to limit the expenditure of state funds for public welfare, successfully meets the equal protection test set forth in *Dandridge* v. *Williams*, 397 U.S. 471 (1970).

Additionally, it was improper for the district court to also strike down the requirement of Connecticut's program that prior approval be obtained from the Department of Social Services, before payment would be made for an abortion. The district court held "[t]he prior approval procedure creates the sort of delay that the Supreme Court found constitutionally

repugnant in *Doe* v. *Bolton, supra*" (Memorandum of Decision, *supra*, at 23).

This action should not have been taken on a motion for summary judgment since there was a disputed issue of fact on this question. This disputed issue of fact was brought to the lower court's attention by an affidavit, timely filed (A. 17; R. 52), and also raised by defendant's counsel at oral argument on the motion for summary judgment. (Transcript of Proceedings, R. 54, p. 25).

Finally, the district court's action in also striking down the further requirement of Section 275 of the defendant's Medicaid policy which required the woman-recipient's prior written consent to the abortion, is contrary to the holding of this Court in the recent case of *Planned Parenthood of Central Missouri* v. *Danforth*, 44 U.S.L.W., 5197 at 5201, (June 29, 1976), that ". . . such a requirement for termination of pregnancy even during the first stage, in our view, is not in itself an unconstitutional requirement."

Consequently, this Court should reverse the holding of the district court and allow Connecticut to re-implement the policy of Section 275 of its Medicaid regulations.

ARGUMENT

I. The Failure To Include, Under Connecticut's Title XIX Medical Assistance Program, A Provision For The Payment Of The Cost Of An Elective Abortion Does Not Infringe Upon The Exercise, By The Plaintiffs Herein, Of A Constitutionally Protected Fundamental Right.

A. THE BASIS OF THE LOWER COURT DECISION

The reasons for the District Court's decision are contained, essentially, in the following portion of the Memorandum of Decision:

"The Constitution does not require the state to pay for any medical services at all. Nevertheless, once a state chooses to establish a program for reimbursing the medical expenses of the indigent, and adopts as part of that program a provision that requires state funding for medical expenses arising from pregnancy, a serious equal protection issue arises if the state refuses to reimburse expenses incurred in procuring an abortion. [footnote omitted]

"When Connecticut refuses to fund elective abortions while funding therapeutic abortions and prenatal and postnatal care, it weighs the choice of the pregnant mother against choosing to exercise her constitutionally protected right to an elective abortion. See *Memorial Hospital* v. *Maricopa County*, 415 U.S. 250 (1974); *Shapiro* v. *Thompson*, 394 U.S. 618 (1969); cf. *Sosna* v. *Iowa*, 419 U.S. 393 (1975). Her choice is affected not simply by the absence of payment for the abortion, but by the availability of public funds for childbirth if she chooses not to have the abortion. When the state thus infringes upon a fundamental interest, it must assert a compelling state interest that justifies the incursion. *Dunn* v. *Blumstein*, 405 U.S. 330, 338-342 (1972)."

408 F. Supp. 660, at 663; Memorandum of Decision, (Juris. statement, p. 18 at 20).

B. CONNECTICUT'S MEDICAID PROGRAM DOES NOT DISCRIMINATE AGAINST ABORTION

Connecticut has always limited the coverage under its Title XIX Medicaid program (as initially it believed was required by federal law) to providing payment thereunder for services which are medically necessary for the patient's health. Earlier in this litigation, on appeal from the single-judge district court, the Second Circuit held, in interpreting the federal

statute (42 U.S.C. § 1396 *et seq.*) that, under Title XIX, a state *may* include payment for an elective abortion under its Medicaid program but it is not *required* to do so. Connecticut, thereafter, elected *not* to include a provision for payment, under its program, for elective abortions, but to continue to pay thereunder for therapeutic abortions which were so certified by the patient's attending physician.

The quotation from the district court's opinion cited above is an incomplete summation as to how both abortion and pregnancy are treated under Connecticut's Medical program. First of all, it should be kept in mind that Connecticut has no program, *as such*, for providing payment for abortions. Secondly, Connecticut has *not* chosen to establish a medical program for reimbursing *all* of the medical expenses of the indigent, but only those medical expenses which are medically necessary for the patient's health. Finally, Connecticut, as part of its medical program, provides payment thereunder for medical expenses arising from *pregnancy* only to the extent that those medical services are necessary for the patient's health — the same limitation upon payment which applies to payment for *abortion* under the program.

Applying this analysis to the portion of the district court's opinion, quoted above, that paragraph can be edited to read as follows:

> "When Connecticut [under its Medical program] refuses to fund elective abortions [which are *not* medically necessary for the patient's health] while funding therapeutic abortions and prenatal and postnatal care [which *are* medically necessary for the patient's health], it weighs the choice of the pregnant mother against choosing to exercise her constitutionally protected right to an elective abortion."

The conclusion of the district court that "it weighs the choice . . . against choosing her . . . right to an elective abortion" now appears to be a *non sequitur*, since it has become apparent that the funding is restricted to providing payment for medical services which are medically necessary for the patient's health; and that payment for abortion, when it occurs, is only incidental to the program's purpose of providing medically necessary care.

In arriving at its decision, the District Court has mistaken the focus of Connecticut's Medicaid program — that focus is neither upon pregnancy nor abortion. It is a program designed to provide medical services which are necessary for the recipient's health. Abortion, just as a tonsillectomy, a hysterectomy or other medical service, is paid for under the program if it is medically necessary for the patient's health. The court overlooked the fact that not only does the state's medical program exclude payment for elective abortions, it also excludes all other non-medically necessary medical care, including non-medically necessary prenatal or postnatal care.

A state regulation which attempted to *exclude* from coverage under Medicaid an abortion which *was* medically necessary for the patient's health might well run afoul of the equal protection clause as an invidious discrimination. That is not the case here. Connecticut makes no invidious discrimination against abortion under its Medicaid program.[3]

The invidious discrimination claimed, implicitly, by the lower court, to be present in Connecticut's policy[4] was the

[3]From July 1, 1973 through June 16, 1974, payment was made for a total of 1,410 abortions under Connecticut's Title XIX program. *Answers To Plaintiffs' Second Interrogatories*, question 8, (A. 13, 14).

[4]Nowhere in its opinion did the lower court state *explicitly* that there was invidious discrimination present under Connecticut's Medicaid abortion policy. However, the court's conclusion that

premise upon which the lower court founded its conclusion that Connecticut "thus infringes upon a fundamental interest" (Juris. statement 21). When that foundation is removed, there remains only a naked claim that the failure, by itself, to fund the cost of an elective abortion results in an infringement upon the plaintiffs' fundamental right(s).

In support of its opinion, the district court has cited the cases of *Memorial Hospital* v. *Maricopa County*, 415 U.S. 250 (1974); *Shapiro* v. *Thompson*, 394 U.S. 618 (1969); and *Dunn* v. *Blumstein*, 405 U.S. 330 (1972). Each of those cases involved the constitutionally protected fundamental right to travel. In *Maricopa*, an Arizona statute requiring one year's residence in a county as a condition to an indigent's receiving nonemergency hospitalization or medical care[5] was held to create "an 'invidious classification' that impinges on the right of interstate travel by denying newcomers 'basic necessities' of life." In *Shapiro*, a Connecticut statute imposing a one year residency requirement was struck down because it imposed a condition upon welfare applicants which impinged upon their constitutional right to travel freely from state to state. In *Dunn*, the Court held that Tennessee may not burden the right to travel by imposing a durational residency requirement of one year in the state and three months in the county in order to be eligible to vote.

The fundamental right involved in each of those cases was the right to travel. In the instant case the fundamental right

Connecticut *"weighs the choice* of the pregnant mother against choosing to exercise her constitutionally protected right to an elective abortion" (juris. statement 20) (emphasis added) must, the defendant-commissioner believes, be regarded as tantamount to such a claim.

[5]It may be noted in passing that although the medical care withheld under the Arizona residency requirement was "nonemergency", it was undoubtedly, unlike that involved in the instant case, *necessary* medical care. ". . . the medical care necessary to relieve him from the wheezing and gasping for breath that attend his illness . . ." 415 U.S. 259-260.

involved is "a woman's constitutional right of personal privacy," encompassing "the unfettered right to terminate a pregnancy through an abortion performed by a licensed physician during the first trimester of pregnancy" (Juris. statement 19-20), as enunciated in *Roe* v. *Wade*, 410 U.S. 113 (1973) and *Doe* v. *Bolton*, 410 U.S. 179 (1973).

In *Maricopa* and *Shapiro*, the durational residency requirement impinged upon the plaintiffs' right to travel by *preventing* them from receiving nonemergency medical care, in the former case, and public welfare benefits in the latter. In *Dunn*, the plaintiff's right to travel was impinged upon by depriving him of the right to vote. In the instant case, no comparable interference results from Connecticut's Medicaid policy on payment for abortion. There is nothing in the Connecticut regulation which prevents a woman from making a choice to have an abortion. Of course, once that choice has been made, if the woman is indigent, she must now look for a source of funds with which to pay the cost of the abortion. The physicians in the instant case were, apparently, in such difficult financial circumstances themselves that they could not permit their patients to pay for the service over a period of time. But under *Roe*, an indigent woman was *not* given *an additional fundamental right* to have an abortion paid for from public funds. A decision of that nature is the prerogative of the legislature.

The district court, in this case, has, nonetheless, held, in effect, that Connecticut's failure to affirmatively appropriate and provide public funds to an indigent woman for payment of the cost of an abortion *is* an interference with the fundamental right announced in *Roe* v. *Wade, supra*. The defendant-commissioner believes there is no constitutional authority to support such a decision.

C. A STATE IS NOT REQUIRED TO FUND THE COST OF THE EXERCISE, BY AN INDIGENT, OF A CONSTITUTIONAL RIGHT

If then, as the defendant-commissioner has contended above, Connecticut's policy on payment for abortion under its medicaid program does *not* infringe upon a fundamental interest (since there is no invidious discrimination involved), the lower court's decision is tantamount to a claim that if Connecticut chooses to provide its public funds (in conjunction with federal funds) to relieve one of the hardships caused by indigency (the lack of adequate medical care) it must also provide public funds to relieve other hardships caused by indigency, at least insofar as the exercise of a fundamental constitutional right is involved.

Stated in simpler terms, the district court's decision would require a state to finance the cost of the exercise of an indigent's fundamental constitutional right. Previous decisions of this Court do not support such a proposition.

In *Helvering* v. *Davis*, 301 U.S. 619 (1937), the Supreme Court indicated that such a decision does not lie with the courts, when Justice Cardozo commented therein as follows:

> "Congress may spend money in aid of the 'general welfare.' [citations omitted] There have been great statesmen in our history who have stood for other views.
>
> We will not resurrect the contest. It is now settled by decision. *United States* v. *Butler, supra*. The conception of the spending power advocated by Hamilton and strongly reinforced by Story has prevailed over that of

Madison, which has not been lacking in adherents. Yet difficulties are left when the power is conceded. The line must still be drawn between one welfare and another, between particular and general. Where this shall be placed cannot be known through a formula in advance of the event. There is a middle ground or certainly a penumbra in which discretion is at large. The discretion, however, is not confided to the courts. The discretion belongs to Congress, unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment. This is now familiar law."

301 U.S. at 640.

In *Doe* v. *Wohlgemuth*, 376 F. Supp. 173 (1974), *modified*, 523 F.2d 611 (3rd Cir., 1975) a three-judge district court held that a Pennsylvania Medicaid regulation, which also excluded payment for a non-therapeutic abortion, was unconstitutional.[6] But in that case even the majority opinion concluded by stating:

"We do not hold that the state must finance a fundamental right, but we do hold that the expression of that

[6]Pennsylvania's Medical Assistance Program imposed more extensive restrictions on payment for abortion than did Connecticut's program. Before payment would be made for an abortion, Pennsylvania required that (1) There is documented medical evidence that continuance of the pregnancy may threaten the health or life of the mother; (2) There is documented medical evidence that the infant may be born with incapacitating physical deformity or mental deficiency; or (3) There is documented medical evidence that a continuance of a pregnancy resulting from legally established statutory or forcible rape or incest, may constitute a threat of the mental or physical health of a patient; (4) Two other physicians chosen because of their recognized professional competency have examined the patient and have concurred in writing; and (5) The procedure is performed in a hospital accredited by the Joint Commission on Accreditation of Hospitals. *Doe* v. *Beal*, 523 F.2d 611, 613, 614.

fundamental right cannot be the basis for invidious discrimination."

376 F.Supp. at 192.

In a dissenting opinion in that case, Judge Weis stated, *inter alia:*

". . . Thus the question here is not whether the state may prohibit certain categories of abortion. It does not do so. The issue is whether the Constitution has thrust upon Pennsylvania an affirmative burden to pay for an elective abortion because the legislature has decided that the State will pay for those abortions for the indigent arising from medical necessity. My conclusion is in the negative because there is no constitutional requirement that the State must finance the exercise of a 'fundamental' right, nor does a classification which distinguishes between medically necessary and non-necessary abortions offend the Equal Protection Clause.

"That the State has an affirmative duty to pay for the implementation of fundamental rights is, with certain narrowly carved exceptions, contrary to the weight of constitutional authority. The unusual situation may be typified by *Griffin* v. *Illinois*, 351 U.S. 12 . . . (1956), requiring that an indigent criminal defendant be furnished with transcripts at State expense. In an analogous situation, *Boddie* v. *Connecticut*, 401 U.S. 371 . . . (1971), held that an indigent could not be barred from securing a divorce because of inability to pay State assessed filing fees. . . .

". . . [A] scrutiny of representative Supreme Court determinations on the 'fundamental' right classification, including those in the right to privacy category, demonstrates no corollary of required State subsidy.

"While *Shapiro* v. *Thompson*, 394 U.S. 618 . . . [footnote omitted] found the right to travel among states to be fundamental, no suggestion has been made that transportation charges for the indigent must be paid by the State.

"While a person may have a fundamental right of privacy to have obscene material in his home, *Stanley* v. *Georgia*, 394 U.S.557, . . . (1969) . . . there have been no serious contentions that the State must furnish such material for the indigent. The fundamental rights of freedom of speech and of the press impose no duty on the State to purchase public address systems or printing presses for those unable to pay for them."

376 F.Supp. at 193-194.

Griffin v. *Illinois*, 351 U.S. 12, (1956) referred to by Judge Weis, *supra*, (requiring that an indigent criminal defendant be furnished transcripts at state expense), and *Douglas* v. *California*, 322 U.S. 353 (1963) (which required the appointment of counsel for indigents on their first appeal of right) were cases involving financial barriers in criminal cases. Nonetheless, the decision in both those cases was based upon a denial of equal protection, not due process, with Justice Harlan dissenting in *Griffin*, 351 U.S. at 29, and *Douglas*, 372 U.S. 360, because he believed that due process should apply. In *Boddie* v. *Connecticut*, 401 U.S. 371 (1971), (requiring the State to waive its divorce filing fee for indigent applicants) Justice Harlan wrote the opinion for the Court in which due process was held to be the appropriate standard upon which to determine the validity of financial barriers limiting access to the courts. This Court subsequently declined to extend the holding of *Boddie* in *United States* v. *Kras*, 409 U.S. 434 (1973), when it upheld a $50.00 filing fee in bankruptcy proceedings, and in *Ortwein* v. *Schwab*, 410 U.S. 656, (1973), when Oregon's

$25.00 filing fee for judicial review of administrative proceedings in welfare cases was upheld. The Court refused thereby to enlarge the areas in which financial barriers to indigents would be lowered.

It is submitted that the prior decisions of this Court do not support the proposition that a State is required to fund, for an indigent person, the exercise of a constitutional right. The reasoning of the District Court in this respect is contrary to the weight of constitutional authority.

D. ONLY A "RATIONAL BASIS" NEED EXIST FOR CONNECTICUT'S MEDICAID REGULATION REQUIRING THAT AN ABORTION BE MEDICALLY NECESSARY FOR THE PATIENT'S HEALTH

The District Court in this case has held that since, in its view, the State's Medicaid regulation regarding payment for abortion interferes with the exercise of a fundamental right, Connecticut must demonstrate that there is a compelling state interest which is being served for the regulation withstand judicial scrutiny, citing *Dunn* v. *Blumstein*, 405 U.S. 330, 338-342 (1972).

But if, as the appellant has claimed herein, *supra*, abortion is not the subject of invidious discrimination under Connecticut's medical program; and, if, as is also contended, a State is not required to fund the exercise of an indigent's constitutional right, then there is no interference by the defendant with plaintiffs' fundamental right to have an abortion. The issue involved is, instead, the plaintiffs' right to receive medical welfare benefits. That right has never been held to be a fundamental one. In determining whether there is a violation of the Equal Protection Clause in such a case, Connecticut's regulation is subject only to the "rational basis" test set forth in *Dandridge* v. *Williams*, 397 U.S. 471 (1970).

In *Doe* v. *Beal*, 523 F.2d 611 (1975), the Third Circuit, sitting *en banc*, held that Pennsylvania's Medical Assistance Program regulations and procedures, as they apply to reimbursement for abortions were invalid because they were inconsistent with Title XIX of the Social Security Act, 42 U.S.C. § 1396 *et seq*. It was therefore unnecessary for that court to reach the constitutional issues.[7] However, in a dissenting opinion in that case, Judge Kalodner (with Judge Adams concurring therein) did comment on the holding of the district court which held that the Pennsylvania regulations were "unconstitutional because they are in violation of the Equal Protection Clause since they create an unlawful distinction between individual women who choose to carry their pregnancies to birth, and indigent women who choose to terminate their pregnancies by abortion." *Doe* v. *Wohlgemuth*, 376 F.Supp. at 191.

The lower court in that case had held that Pennsylvania must show a compelling reason for limiting payment for abortion under its Medical Assistance Program to situations requiring necessary medical care. In his dissent, Judge Kalodner stated *inter alia:*

> "The cornerstone of the plaintiffs' contention is that the Regulations, in the *absence of a compelling state interest,* violate the Equal Protection Clause in that they discriminatorily divide pregnant eligibles *into two classes* — one which chooses to carry pregnancy to full term delivery, and another which elects to terminate pregnancy for non-therapeutic reasons.
>
> "The fallacy of the stated contention is that it disregards the fact that Pennsylvania in its medicaid program

[7]Of course in the instant case, the 2nd Circuit reached a contrary result. 522 F.2d 928 (1975); as did the 5th Circuit in Roe v. Ferguson, 515 F.2d 279 (6th Cir., 1975).

has committed itself to extend medical care to its eligibles only where *'necessary medical care' is required.*

The only classification made by the Regulations is between necessary medical care and non-necessary medical care. Such a classification does not call into play the 'compelling state interest' test. It is subject only to the 'reasonable basis', otherwise stated, 'rational basis' test, spelled out in *Dandridge* v. *Williams*, 397 U.S. 471, 90 S.Ct. 1153, 25 L.Ed. 2d 491 (1970). There, the Court held that a state regulation which reduced family welfare benefits did not violate the Equal Protection Clause. In doing so it said in relevant part at page 485, 90 S.Ct. at page 1161:

> 'In the area of economics and *social welfare, a* State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. *If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification* 'is not made with mathematical nicety or because in practice it *results* in *some inequality.' Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61, 78 [31 S.Ct. 337, 55 L.Ed. 369]. 'The problems of government are practical ones and may justify, if they do not require, rough accommodations — illogical, it may be, and unscientific.' *Metropolis Theatre Co.* v. *City of Chicago*, 228 U.S. 61, 69-70 [33 S.Ct. 441, 57 L.Ed. 730]' (emphasis supplied).

"I am of the opinion that the classification between 'necessary medical care' and 'non-necessary medical care' survives the application of the 'reasonable basis' and/or 'rational basis' tests."

523 F.2d, at 633.

In some of the Court's recent opinions, an intermediate level of scrutiny — neither the strict level of the compelling state interest test nor the minimal level of the rational basis test — has been employed. This was the case, for example, in *Weber* v. *Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972). And in *Chicago Police Dept* v. *Mosley*, 408 U.S. 92, 95 (1972), the test announced by the Court in finding a denial of equal protection in an ordinance which exempted peaceful labor picketing from its ban on picketing near school buildings was whether there is "an appropriate governmental interest suitably furthered by the differential treatment."

Even if this so-called "means-oriented" scrutiny is applied to the restriction on payment for abortion in the instant case, Connecticut's regulation will pass muster, since there is a state governmental interest present which is suitably furthered by the limitation against payment for an elective abortion. That interest is the need of the State to control the amount of its limited public funds which will be allocated to its public welfare budget.

In *Eisenstadt* v. *Baird*, 405 U.S. 438 (1972), a case in which this Court struck down a Massachusetts criminal statute under which the defendant had been convicted for dispensing contraceptives, the Court indicated that all that needed to be shown to uphold the statute was that the means were "rationally related to a valid public purpose" and that it was not required that they be "necessary to the achievement of a compelling state interest" *Id.* at 447, n.7. But despite this indication, the Court inquired closely into the purposes articulated by Massachusetts for the enactment of the statute, and disbelieved and rejected two of the proferred reasons — rather than, as under the McGowan test, conceiving of a set of circumstances which would uphold the validity of the statute.

Eisenstadt bears a similarity to the instant case in at least one respect. The district court also disbelieved the reasons articulated for the adoption of Connecticut's Medicaid policy on payment for abortion. Those reasons were:

> 1) "the necessity to limit state funds in the welfare field."
>
> 2) ". . . the State has a right to limit its Medicaid program expenditures, particularly where [as here] . . . a service which is being sought to be included for payment that is not medically necessary, . . . [A]ll the more so when . . . the State does not pay . . . for some medical services which are medically necessary because of the prohibitive costs . . .
>
> ". . . if this Court were to rule that the State must pay for services . . . not required for the patient's health, it . . . seems . . . there would be no way to exclude services which are necessary . . . and no way to exclude any service performed by a physician, including . . . cosmetic surgery . . ." *Transcript of Proceedings* (R. 54, 25-27).

The lower court rejected the proferred reasons out of hand, in the absence of any evidence in the record to the contrary. The district court said it would be cheaper, at least in the long run, for the State to provide payment for an indigent's elective abortion. *Memorandum of Decision*, Juris. statement, 18 at 21. (Of course, Connecticut is *presently* faced with a fiscal crisis and appears to be more concerned with the short-run aspects of its problem.) The district court also speculated upon the wisdom of the state's policy when it stated:

> "Furthermore, the birth of a child to a welfare mother increases the burden on the state's welfare coffers because the newly-born indigent child will, in all likelihood, qualify for state welfare assistance [footnote omitted]. The

state's assertion that it saves money when it declines to pay the cost of a welfare mother's abortion is simply contrary to undisputed facts." *Memorandum of Decision, Id.*, at 21.

Precisely which "undisputed facts" the district court was here referring to is uncertain. This was, after all, a hearing on the plaintiff's motion for summary judgment. The defendant-commissioner certainly did dispute the "undisputed facts", if, by that term, the district court meant that the policy of limiting expenditures under the Medicaid program to medically necessary services would not help to conserve the state's limited fiscal resources.

Of course, there are many unstated assumptions in the district court's hypothesis, but even if we were to concede the accuracy of the district court's conclusion in this respect, that is a judgment not of the legality of the policy but, rather, of its wisdom. It is not the function of the courts to judge the wisdom of legislative enactments[8] but only to pass upon their legality.[9]

In the instant case, the district court, in effect, applied what amounted to an inversion of the rational basis test of *McGowan*. Rather than upholding Connecticut's Medicaid regulation "if any state of facts reasonably may be conceived to justify it," the Court appeared to believe it should strike down the Connecticut regulation if a state of facts reasonably could be conceived to invalidate it. Of course, the lower court did not consciously apply any such standard but the result was the same.

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[8]Or, as in this case, the adoption of a policy by an administrative agency as a result of a delegation of power from the legislature.

[9]See *Helvering* v. *Davis*, 301 U.S. 619, 644 (1937).

When a governmental interest is articulated which does in fact further a declared purpose, a court should not then attempt to determine whether, in fact, a member or members of the legislative or executive branch might privately harbor an unstated secondary (or, for that matter, even a primary) reason(s) for its action which the court may consider ignoble or sinister. Yet, this apparently is what the lower court did in this case. The need of the state to limit its public welfare expenditures is a proper and necessary function of government. Limiting, without invidious discrimination, the scope of the services for which payment would be made under Connecticut's Medicaid program would, without question, limit the cost of such a program. In *Eisenstadt*, this Court demonstrated by compelling logic that Massachusetts' articulated purposes for the enactment of the statute did not and could not achieve the proclaimed goals of the legislation.[10] In the instant case, unlike *Eisenstadt*, the district court could make no comparable logical refutation of the professed reasons for the adoption of Connecticut's Medicaid abortion regulation, because the means adopted were rationally related to a valid public purpose. A court judgment rendered under such circumstances is one founded upon a fragile framework of surmise and conjecture. It harkens back to an earlier time.

The imputing, by the courts, of unarticulated reasons for enactment of legislation was an apparent concern of Mr. Chief Justice Burger in *Eisenstadt*, *supra*. In a dissent in that case he stated, *inter alia:*

> "It is possible, of course, that some members of the Massachusetts Legislature desired contraceptives to be dispensed only through medical channels in order to minimize their use, rather than to protect the health of their users, but I do not think it is the proper function of this

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[10]See *Eisenstadt* v. *Baird*, 405 U.S. 438, 447-452.

Court to dismiss as dubious a state court's explication of a state statute absent overwhelming and irrefutable reasons for doing so."

405 U.S. 438 at 468.

Mr. Justice Harlan had previously warned the courts against attempting to divine subjective legislative and executive motivations in *Rosado* v. *Wyman*, 397 U.S. 397, (1970), when he stated:

"We reach our conclusions without relying on the finding made by the court below that in § 131-a New York was *attempting* to constrict its welfare payments. Speculation as to legislative and executive motive is to be shunned. - - -" [emphasis in original]

397 U.S. 419.

The action of the lower court amounted to an attempt to alleviate a hardship suffered by the plaintiffs as a result of their indigency. Mr. Justice Douglas stated in his dissent in *Memorial Hospital* v. *Maricopa County*, 415 U.S. 250, (1974), (to which is appended: "Gourmand And Food — A Fable"), that were it not for the presence of invidious discrimination in that case:

"The political processes [footnote omitted] rather than equal protection litigation are the ultimate solution of the present problem [of the legal and economic aspects of medical care]."

415 U.S. at 272.

As a legal commentator has recently observed:

". . . the dangers of [judicial] intervention [in existing public benefit programs] are apparent. One is that, in

voiding public welfare classifications, courts engage in what is indisputably the most basic of all legislative functions — from and to whom to raise and distribute revenue. For the very essence of politics is often simply a matter of who gets and who pays.

• • •

". . . [W]hen extended sufficiently, judicial reduction of economic disparities reduces politics almost to a nullity. It is difficult to see how one's vote means anything if it is not a broad entrustment to legislatures of the power to raise and disburse according to the wisdom of their priorities, the public funds."[11]

That same commentator goes on to make some observations that are an apt summation of the problem confronting the Court in this case:[12]

"That inequalities of means remain a matter of legislative wisdom is deeply argued. America has long looked most ambivalently at the status of poverty. Is it a state of helplessness before crushing obstacles or rather a condition escapable under the discipline of self-betterment? Does it represent indolence, disability, or a string of irreversible past hard knocks and circumstances? Is assistance "used" or squandered? Does aid promote or undermine an effort at personal improvement? Are the claims of the poor on public funds their just due or a taking of others' efforts? What, one may ask to sum it up, gives one an innate claim to public funds? The anguished and elemental philosophical difficulty of this question parallels the ambiguities in the state of poverty itself, simultaneously calling for

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[11]Wilkinson, The Supreme Court, The Equal Protection Clause, And The Three Faces Of Constitutionality, 61 Va. L.R. 945, 1010-1011, (June, 1975).

[12]Wilkinson, *Id.*, 1016-1017.

sympathy and realism. For the judiciary to pre-empt such legitimate debate with judgment on one side — albeit the allegedly compassionate one — is to replace with self-righteous fiat an ancient dilemma that should be thought and argued out among the people themselves."

Appellant submits that, in determining whether plaintiffs had been denied equal protection, it was error for the District Court to apply the "compelling state interest" test to Connecticut's Medicaid regulation. Prior decisions of this Court indicate that in the area of economics and social welfare the appropriate test to be applied is the "rational basis" test of *Dandridge* v. *Williams, supra,* which has been reiterated in *Jefferson* v. *Hackney,* 406 U.S. 535, 546 (1972); and *Richardson* v. *Belcher,* 404 U.S. 72, 80-81 (1971).

II. On A Motion For Summary Judgment, It Was Improper For The District Court to Enjoin The Defendant-Commissioner's Requirement That Prior Approval Be Obtained Before Payment Would Be Made For An Abortion, Since There Was A Disputed Question Of Fact On This Issue.

Under Connecticut's Medicaid program, prior authorization must be obtained from the Department of Social Services before payment for an abortion will be made. This requirement of prior approval is not applicable to physician's services rendered for prenatal and postnatal care. There are, however, many medical services provided under Connecticut's program which also require that prior approval be obtained before payment will be made. Among these are, for example, all dental services other than those of an emergency nature,[13] podiatry services,[14] prosthetic devices,[15] and physical therapy.[16]

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[13]See Connecticut Department of Social Services Manual, Volume III, Chapter III, Index 215 (R. 1).
[14]*Id.*, Index 220.1-220.11
[15]*Id.*, Index 280.1
[16]*Id.*, Index 282

Plaintiffs filed affidavits in support of their motion for summary judgment (A. 36 at 38, 56 at 58, 60 at 61, 63 at 65) in which it was claimed that the Department's prior approval procedures causes unnecessary delay and interference with the immediate performance of an abortion. The defendant-commissioner filed a counteraffidavit disputing these claims, and indicating that in any case in which the attending physician believed that a delay would pose an increased risk to his patient, oral approval, by telephone, could be obtained from the Department. (A. 17). The defendants had also indicated that the average time lapse between receipt of a request for prior approval in the office of the welfare department to the time approval was mailed out to the initiating party was approximately three days. *Answers to Interrogatories,* question 4, (A. 10).

The defendant-commissioner had also filed a motion to strike the affidavits (A. 15) submitted by the plaintiffs with their motion for summary judgment on the ground that the evidence contained therein was inadmissible and in contravention of Rule 43(a) of the Federal Rules of Civil Procedure which requires that testimony of witnesses be taken orally in open court.

In an *amicus* memorandum submitted at an earlier phase of this action, at the request of the U.S. Court of Appeals (2d. Cir.), HEW indicated that "a reasonable prior authorization expeditiously handled would not be inconsistent with Title XIX" and ". . . indeed, where a state wishes to ensure that limited resources will be used only for medically necessary procedures, a requirement of prior approval for Medicaid payments may be the most efficient way of administering the program in the best interests of the recipient." (A. 72).

Therefore, it was improper for the district court to enjoin the defendant-commissioner's requirement that prior approval

be obtained before payment would be made for an abortion under the Connecticut Medicaid program, since there was a disputed question of fact on this issue.

III. The District Court Improperly Struck Down The Requirement That, Before An Abortion Would Be Paid For Under The Title XIX Medicaid Program, The Recipient-Applicant's Prior Written Consent Must Be Obtained.

> The district court also ruled in its opinion (A. 23) that: "Similarly, § 275's requirement that evidence of the patient's consent be presented to the state prior to a first-trimester abortion furthers no legitimate state interest that justifies the distinction between abortions and other medical responses to pregnancy." [footnote omitted] This ruling is contrary to this Court's recent holding in Planned *Parenthood of Central Missouri* v. *Danforth*, 44 U.S.L.W. 5197 at 5201, (June 29, 1976).

CONCLUSION

For the foregoing reasons, this Court should reverse the holding of the district court and allow Connecticut to re-implement the policy of Section 275 of its Medicaid regulations.

Respectfully submitted,

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